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In the Supreme Court of the United States

OCTOBER TERM, 1939.

No. 707. 14

REPUBLIC STEEL CORPORATION,
Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,
and
STEEL WORKERS ORGANIZING COMMITTEE,
Appellees.

BRIEF OF APPELLANT, REPUBLIC STEEL CORPORATION.

LUTHER DAY,
1759 Union Commerce Bldg., Cleveland, Ohio,
THOMAS F. PATTON,
Republic Bldg., Cleveland, Ohio,
JOSEPH W. HENDERSON,
Packard Bldg., Philadelphia, Pa.,
MORTIMER S. GORDON,
120 Broadway, New York, N. Y.,
Attorneys for Appellant,
Republic Steel Corporation.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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BRIEF OF APPELLANT, REPUBLIC STEEL CORPORATION.

I.

OFFICIAL REPORT OF OPINIONS BELOW.

The findings of fact, conclusion of law, and order of the National Labor Relations Board (R. II, 833-1109)[1] are reported in 9 N. L. R. B. 219. The opinion of the court below, the Third Circuit Court of Appeals, (R. VIII, 6277) is reported in *Republic Steel Corporation et al. v. National Labor Relations Board,* 107 Fed. (2d) 472.

II.

JURISDICTION.

The decree of the Circuit Court of Appeals was entered January 2, 1940 (R. VIII, 6294). A petition for a writ of certiorari was filed by the appellant, Republic Steel Corporation, in this Court on February 8, 1940, and was denied

[1] Roman and arabic numerals in parenthesis refer to volume and page, respectively, of the record, throughout.

by order of this Court dated April 8, 1940, 309 U. S. (Preliminary Print, No. 1) xi, 60 S. Ct. 806. A motion by the appellant for leave to file out of time a petition for rehearing of its petition for a writ of certiorari, accompanied by a petition for rehearing thereof, was filed in this Court on May 13, 1940. On May 20, 1940 this Court entered the following order, 309 U. S. (Preliminary Print, No. 3) xi, 60 S. Ct. 1072:

> "Motion for leave to file a petition for rehearing granted, and the petition for rehearing is also granted. The order denying certiorari, dated April 8, 1940 is vacated. The petition for writ of certiorari to the Circuit Court of Appeals for the Third Circuit is granted, limited to the fourth question therein presented, which relates to the work relief provisions of the decree below: provided that this order shall not operate to suspend the remaining provisions of the decree."

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, Title 28 U. S. C. A., Section 347, and Sections 10 (e) and (f) of the National Labor Relations Act, Title 29 U. S. C. A., Section 160, c. 372 § 10, 49 Stat. 453.

III.

STATEMENT OF THE CASE.

This is an appeal from a decree of the Third Circuit Court of Appeals, issued on January 2, 1940 (R. VIII, 6294) affirming and enforcing an order of the National Labor Relations Board (hereinafter called the "Board") issued on October 18, 1938 (R. II, 833).

This appeal is limited by the order of this Court granting certiorari "to the fourth question therein presented, which relates to the work relief provisions of the decree below. * * *"

The appellant, as found by the Board (R. II, 842), *et seq.*) is engaged in the business of manufacturing steel and steel products with plants in Ohio, Michigan, Pennsylvania

and elsewhere, employing on May 1, 1937, 59,282 persons, 40,172 of whom were employed in its Ohio plants. The proceeding before the Board here involved was based upon an original and two supplemental charges (R. I, 1, 7, 10) and a complaint by the Board (R. I, 13) involving only certain of appellant's plants located at Massillon, Canton, Youngstown, Warren, Niles and Cleveland in the State of Ohio. The Board found that appellant had engaged in certain unfair labor practices (R. II, 845-1071) and that these unfair labor practices constituted the underlying cause of a strike by the Steel Workers Organizing Committee (found by the Board to be a labor organization affiliated with the Committee for Industrial Organization (R. II, 845)) which commenced May 25 and 26, 1937 (R. II, 1071). The Board, on October 18, 1938 (R. II, 833), ordered appellant to cease and desist and to reinstate certain of its employees with compensation for loss of wages during certain periods (R. II, 1104). The court below enforced this order by its decree issued January 2, 1940 (R. VIII, 6294) with no changes pertinent herein.

By Section 2 paragraphs (b) and (c) of its decree[2] the lower court ordered appellant to offer reinstatement to specified employees found by the Board to have been discriminatorily laid off or discharged before, or refused reinstatement after, the strike and "make them whole for any losses of pay they have suffered by reason of the petitioner's discriminatory acts, by payment to each of them respectively, of a sum of money equal to that which each of them would normally have earned as wages during the period," specifying the period for which compensation was ordered made, "less the amount, if any, which each earned during said period." By Section 2, paragraph (f) the court below ordered appellant to offer to those employees at certain of its Ohio plants who went on strike on

[2] The pertinent sections of the lower court's decree are set forth in full in Appendix A.

May 25, 1937 and who had made application for reinstatement after the order of the Board dated October 18, 1938, or should do so after the date of the court's decree, reinstatement, or placement upon a preferential list if employment were not immediately available. Section 2, paragraph (g) ordered appellant to make whole "all the employees referred to in paragraph 2 (f)" for any losses they might have suffered by refusal of reinstatement or placement upon the preferential list required by the Board's order of October 18, 1938, or by reason of refusal of reinstatement or placement upon the preferential list ordered by Section 2 (f) of the court's decree, by payment of a sum of money equal to that which each would normally have earned as wages during the period from five days after the date of any application for reinstatement made subsequent to the Board's order dated October 18, 1938, to the date of offer of reinstatement or placement upon the preferential list, "less the amount, if any, which each respectively earned during said period."

Paragraphs (b), (c) and (g) of Section 2, after providing for deduction of amounts earned from normal wages in measuring the compensation awarded, each contain the following identical provision:

> "* * * deducting, however, from the amount otherwise due to each of the said employees, monies received by said employees during said periods for work performed upon Federal, State, county, municipal or other work relief projects; and pay over the amounts, so deducted, to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work relief projects;"

This provision constitutes the portion of the decree of the lower court involved in the question presented on this appeal.

This provision was first included by the Board in its second final order in the case at bar. It has now become

standard.[3] At the date of this brief, its validity has been sustained by the Third Circuit Court of Appeals, the lower court herein, with the sole comment that it was "within the Board's discretion and not unreasonable" (R. VIII, 6286). It has been held invalid, as beyond the Board's jurisdiction, by the Second Circuit Court of Appeals, *National Labor Relations Board v. Leviton Mfg. Co. Inc.* (C. C. A. 2) 111 Fed. (2d) 619, *Phelps Dodge Corporation v. National Labor Relations Board* (C. C. A. 2) 113 Fed. (2d) 202; by the Ninth Circuit Court of Appeals, *National Labor Relations Board v. Tovrea Packing Co.* (C. C. A. 9), 111 Fed. (2d) 626; by the Seventh Circuit Court of Appeals, *Stewart Die Casting Corporation v. National Labor Relations Board* (C. C. A. 7), — Fed. (2d) —, 6 L. R. R. 691;[4] *New York Handkerchief Company v. National Labor Relations Board* (C. C. A. 7), ... Fed. (2d) ..., 6 L. R. R. 729; *M. H. Ritzwoller Co. v. National Labor Relations Board* (C. C. A. 7), — Fed. (2d) —, 6 L. R. R. 758; and by the First Circuit Court of Appeals, *National Labor Relations Board v. Waumbec Mills, Inc.* (C. C. A. 1), — Fed. (2d) —, 6 L. R. R. 877. It has not been held valid by any Circuit Court of Appeals which appears from its opinion to have considered the question, other than the court below.

IV.

SPECIFICATION OF ERRORS.

The fourth question presented in the petition for certiorari, to a consideration of which this appeal is limited, is as follows:

> "Whether, as was held by the court below, the Board, having ordered deduction from back pay of amounts paid by governmental work relief projects to strikers

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[3] The Board stated in its brief opposing certiorari herein (page 24) that "The provision is now included in all orders of the Board providing for back pay * * *."

[4] Labor Relations Reporter. Pertinent parts of the opinions therein reported are contained in Appendix B.

and certain other employees discharged by petitioner, for services actually performed by them on such projects, had jurisdiction to order petitioner, as it did, to reimburse such governmental work relief projects for the moneys so paid to such strikers and discharged employees."

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

POINT A.

Section 2, paragraphs (b), (c) and (g) of the lower court's decree, enforcing the identical order of the Board, in substance require appellant to reimburse the government or governments which supplied the funds for work relief projects, upon which employees covered by the decree worked, for amounts paid to such employees for "work performed." This is *affirmative action.* Section 10 (c), 29 U. S. C. A. Sec. 160 (c), of the National Labor Relations Act (hereinafter called "the Act"), grants to the Board jurisdiction to require appellant to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." The Board's jurisdiction in this respect is remedial, not punitive, and is to be exercised as a means of removing or avoiding the consequences of violations of the Act where the consequences are of a kind to thwart the purposes of the Act. The purposes of the Act are to prevent obstructions of interstate commerce by securing the rights of employees to self organization and collective bargaining. The portion of the Board's order requiring reimbursement of governments sponsoring work relief projects, enforced by the lower court cannot, as a matter of law, effectuate, but instead tends to thwart, the policies of the Act, and is penal and not remedial. Therefore, this portion of the order is beyond the jurisdiction of the Board, *as a matter of law,* and the lower court erred in enforcing it.

POINT B.

Section 2, paragraphs (b), (c) and (g) of the decree of the lower court, are erroneous because the Board's order enforced in this respect was arbitrary and unreasonable in that (1) it does not appear that the fiscal agencies of the government or governments providing the funds for work relief projects which have paid moneys to employees covered by the decree for work performed on such projects have requested reimbursement for such payments from the appellant, or (2) that such agencies have the power to receive the amounts ordered paid to them by the appellant, and (3) the appellant cannot properly be required to ascertain in what proportion, if any, the fiscal agencies of the government or governments, to which payments are ordered to be made, have supplied funds for the work relief projects which have paid moneys to the employees covered by the decree, and to reimburse such agencies in such proportions.

POINT C.

If it be assumed, for the sake of the argument, that the Board could properly find, under any circumstances, that it would effectuate the policies of the Act to order affirmatively reimbursement of work relief projects for moneys paid to employees covered by the decree, which is denied, there is no evidence in the record in the case at bar to support such a finding by the Board, the Board has made no proper finding that such an order will effectuate the policies of the Act, and the Board's order in this respect was based upon a finding not supported by evidence. Therefore, this portion of the Board's order, as enforced by the lower court, was not supported by evidence or findings and the lower court erred in enforcing it.

POINT A.

The Statement of The Case, *supra*, page 2, shows that the lower court decreed that three things be done in determining the amounts to be paid by appellant and the disposition thereof. These were as follows: (1) The amount of money which each employee would normally have earned as wages during the period for which compensation was awarded was first to be determined; (2) the amount which the employee actually earned during this period was to be ascertained and deducted from the amount determined as above; (3) from the net amount so determined appellant was required to deduct an amount equal[5] to the moneys received by the employee for work performed upon work relief projects and pay over the amount so deducted to the fiscal agency of the government or governments which supplied the funds for the work relief projects for which he performed the work. Appellant is required to pay to the employee a sum of money equal to that which he would normally have earned as wages during the period, less the two deductions provided for; is not required to pay to any one the deduction provided for in (2) above; but is required to pay the deduction provided for in (3) above to the governments sponsoring the work relief project or projects as above outlined.

The following hypothetical case is a concrete illustration. Employee A went out on strike on May 25, 1937, and is therefore covered by Section 2, paragraphs (f) and (g) of the court's decree. He applied for reinstatement two days after October 18, 1938, the date of the Board's order, was denied reinstatement until April 10, 1940, two days

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[5] The decree requires appellant to make such employees whole by payment of a sum of money "deducting, however, from the amounts otherwise due to each of the said employees, *moneys received* by said employees * * * for work performed upon * * * work relief projects * * *." However, it is obvious that since the employees have received the moneys, and the appellant has not, the court intended the deduction of *an amount equal to* moneys so received.

after this Court overruled appellant's petition for a writ of certiorari, but was then offered reinstatement in his former position. He would normally have earned as wages during the period between October 25, 1938 (five days after his application for reinstatement), and April 10, 1940, an average of $150 a month, or a total of $2,625. On October 25, 1938 he obtained a job carrying bricks on a PWA slum clearance apartment building project at $60 a month which he held for twelve months, earning $720. Thereafter, for the balance of five and one-half months of the period he obtained a job carrying bricks on a private apartment building project at $100 a month, earning $550. From the amount of $2,625, gross "normal wages," is deducted the total amount earned on PWA and in private employment, $1,270. Appellant is required to pay the difference, $1,355, to the employee, nothing to the private employer, but is also required to pay $720 to the fiscal agency of PWA, or, if PWA has put up part of the funds for the particular project on which Employee A worked, and some other state, county or municipal governmental body the balance, as is often the case, appellant is apparently required to distribute the $720 in proportion to the amounts contributed by the respective fiscal agencies.

The foregoing illustration relates to a striking employee, but is equally illustrative of the method of determining amounts due specified employees covered by Section 2, paragraphs (b) and (c) of the decree of the lower court.

It will be immediately noted that the substantial effect of these portions of the decree of the lower court is to require the appellant to reimburse work relief projects for moneys paid out by such projects to employees covered by the decree "for *work performed* upon" such projects (so specified in the decree). To put it another way, the appellant is compelled to pay for work performed by the employee for the work relief project which receives the benefit and advantage of such work for nothing. The court below

held that this order was "within the Board's discretion and not unreasonable" (R. VIII, 6286), without further comment, except that "A similar order was enforced in *National Labor Relations Board v. Planters Mfg. Co.*, 105 F. (2d) 750." (R. VIII, 6286.)[6]

The Board had no jurisdiction to order the appellant to pay over to the governments furnishing funds for work relief projects amounts equal to the moneys paid by such projects to employees covered by the Board's order for work performed upon such projects, and the lower court erred in enforcing the Board's decree in this respect for the following reasons.

First, the Board's jurisdiction is remedial, not penal, and is limited to ordering affirmative action which will effectuate the policies of the Act by removing or avoiding the consequences of violations thereof where the consequences are of a kind to thwart the purposes of the Act.

The Board being purely a creature of statute, its powers are limited to those conferred upon it by the Act which created it. Section 10 (c) of the Act, 29 U. S. C. A. Sec. 160 (c), confers jurisdiction upon the Board, if it finds that a person has engaged in unfair labor practices, to issue

> "* * * an order requiring such person to cease and desist from such unfair labor practice, *and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.* * * *"

The portion of the decree of the court below here involved, of course, requires the appellant to take affirmative action.

This Court has recognized that the jurisdiction of the Board to require an employer to take affirmative action under Section 10 (c) of the Act is limited. In *Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S.

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[6] Upon inquiry, counsel for the Planters Mfg. Co. in that case informed us that the question was not raised due to insignificance of the amount involved.

197, Mr. Chief Justice Hughes, announcing the opinion of the court, with regard to the authority of the Board, said, page 235:

> "* * * *That authority, if it exists, must rest upon the provisions of Sec. 10 (c).* That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices 'and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.
>
> *The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.* * * *"[7]

In *National Labor Relations Board v. Fansteel Metallurgical Corporation,* 306 U. S. 240, this Court adhered (page 257) to the fundamental proposition announced in *Consolidated Edison Co. v. National Labor Relations Board, supra,* holding that, as a matter of law, reinstatement of "sit-down" strikers could not "effectuate the policies of the Act" but would thwart these policies. A minority of the court differed with the majority in the foregoing cases—upon the application of the rule to the facts in the former, and the extent of the Board's power thereunder in the latter,—but there was no dissent from the fundamental proposition above set forth. In *National Labor Relations Board v. Newport News S. B. & D. D. Co.,*

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[7] Emphasis in quotations is ours, unless otherwise noted.

308 U. S. 241, Mr. Justice Roberts, delivering the unanimous opinion of this Court, said, page 250:

> "* * * Sec. 10 (c) was not intended to give the Board power of punishment or retribution for past wrongs or errors. Action under that section must be limited to the effectuation of the policies of the Act."

Second, this portion of the Board's order, enforced by the lower court, does not, and cannot as a matter of law, remove the consequences of violations of the Act of a kind to thwart its purposes.

The purposes of the Act are to prevent labor disputes from interfering with interstate commerce by protecting the rights *of employees* to self organization and collective bargaining as this Court stated in *National Labor Relations Board v. Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 265:

> "The history of the Act and its language show that its ruling purpose was to protect interstate commerce by securing to employees the rights established by § 7 to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for that and other purposes. *National Labor Relations Board v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, 23, 33. This appears both from the formal declaration of policy in § 1 of the Act, *National Labor Relations Board v. Jones & Laughlin Steel Corp., supra,* 22-24, and from § 7, in itself a declaration of the policy which, in conjunction with § 10 (c), it adopts as the controlling guide to administrative action."

In the cases of discharges, layoffs or strikes resulting from violations of the Act, the consequences of the violation are loss of employment. Loss of employment is a consequence of a kind to thwart the purposes of the Act since, if not remedied, it will deter in the future employees involved from exercising their rights secured by Section 7 of the Act. The Board may, therefore, require affirmative action for the purpose of avoiding or neutralizing this consequence by restoring the employees affected to their status

quo. That this is the basis of such an order appears from the decision of this Court in *National Labor Relations Board v. McKay Radio & Telegraph Co.*, 304 U. S. 333, in which this Court said, page 348:

> "* * * The Board enjoined further discrimination against employes by reason of union affiliation *but it could not grant complete relief in respect of the five men short of ordering that the discrimination be neutralized* by their being given their former positions and reimbursed for the loss due to their lack of employment consequent upon the respondent's discrimination. * * *"

Observe that the purposes of the Act are to prevent interference with interstate commerce, *which is the only constitutional basis for the Act,* by securing and protecting *the rights of employees* in labor matters, *and nobody else.*

The portion of the lower court's decree here involved does not, and cannot, remove the consequences of violation of the Act which are of a kind to thwart the purposes of the Act.

In the first place, the purposes of the Act are merely to protect the right *of employees.* The requirement that appellant reimburse work relief projects for amounts paid the employee does not assist in restoring the employee to status quo since he is not the recipient.

In the second place, if the extent of the Board's remedial jurisdiction to effectuate the policies of the Act by requiring affirmative action were still open to question, which it is not, due to the decisions of this Court, how could reimbursement of work relief projects for monies paid to employees conceivably effectuate the main purpose of the Act, necessary to its constitutionality, namely, the prevention of interference with interstate commerce arising from failure to neutralize the consequences of unfair labor practices upon employees? Employees placed in status quo by the Board's order certainly are not interested in the disposition made of payments which they do not receive, and will

not conceivably strike if work relief projects for which they "performed work" are not reimbursed. Certainly, in no event will work relief projects engage in strikes interfering with interstate commerce because they are not so reimbursed. On the contrary, in the legislative finding contained in Section I of the Act, 29 U. S. C. A. Section 151, there is no suggestion that interferences with interstate commerce sought to be prevented are those caused otherwise than by interference with the rights *of employees.*

Therefore, as a matter of law, the order of the Board in this respect was beyond its jurisdiction because it did not remove the consequences of violations of the Act of a kind to thwart its purposes. In *Stewart Die Casting Corporation v. National Labor Relations Board* (C. C. A. 7, July 3, 1940), — Fed. (2d) —, 6 L. R. R. 691, the court, in holding this standard order of the Board invalid, said, page 696:

> "The Board inquires in its brief, in connection with this matter:
>
> "'* * * Should the burden of relieving the distress of such employees be placed upon the public generally or upon the employer whose unlawful practices are responsible for their being out of work?'
>
> "*This inquiry, in our opinion, is beside the question.* Undoubtedly, the Board has the authority to order compensation for the employee who has sustained a loss by reason of an unfair labor practice on the part of the employer. *We find nothing in the Act, however, which indicates an intention by Congress to confer upon the Board the power of guardianship over the treasurer of a governmental agency.* * * *"

This epitomizes our argument above that, while the Board has jurisdiction to rehabilitate the employee, it has no general jurisdiction to do what it considers equity between the employer and a work relief project.

Third, this portion of the Board's order, enforced by the decree of the lower court, not only does not "avoid

the consequences of violation where those consequences are of a kind to thwart the purposes of the Act" but, on the contrary, *tends to itself thwart the purposes of the Act.* In *National Labor Relations Board v. Fansteel Metallurgical Corporation,* 306 U. S. 240, this Court took into consideration the fact that reinstatement of "sit-down" strikers would tend to thwart the purposes of the Act by encouraging lawless conduct tending to interfere with interstate commerce in determining that the order of the Board could not, as a matter of law, effectuate the policies of the Act. The portions of the lower court's decree here in question will likewise tend to thwart the purposes of the Act. Since work relief projects cannot furnish work to all applicants, which is commonly known, officials seeking to reduce costs of projects naturally will tend to prefer strikers, in view of the possibility of obtaining a return of wages paid, and this, in turn, will tend to encourage employees to resort to industrial strife for the purpose of settling labor disputes, rather than the peaceable method of resort to the Board.

Fourth, this portion of the Board's order, enforced by the lower court, is not remedial, but penal.

As above seen, the decree, in the respect here complained of, is not remedial as to the employees. Neither is it remedial as to the work relief projects which appellant is ordered to reimburse.

The Board's theory in this respect is that "to hold that the losses accruing from the appellant's unfair labor practices must be borne by the government or governments financing the work relief project would not effectuate the purposes of the Act" (II, 1096). It is clear that the Board's theory is faulty because theoretically there is no "loss" to the project. It must be based upon the premise that if the employee's work had not ceased as a result of the employer's unfair labor practices he would not have been employed upon the work relief project, or in other

words, that his job would not have ceased as a result of natural causes other than unfair labor practices, such as a decrease in demand for labor. Otherwise, the "loss" resulting from his employment by the project would not be attributable to the employer's unfair labor practices. If the job continued, it must be assumed that someone was employed to take the employee's place who would otherwise have been unemployed and would theoretically have been employed by the work relief project. Therefore, the project suffers no "loss" because if it had not employed the employee, it would have employed the person who was employed to take his place. Furthermore, the work relief project does not sustain any "loss" in the amount of wages paid to workers, because the government receives "value" for their work. Payments for work performed for relief projects, such, for instance, as PWA, are not merely charitable in their nature but are for work actually performed. As stated in *Block v. Sassaman,* 26 Fed. Sup. 105, 106:

> "* * * While the activities of the Works Progress Administration result in what has been commonly known as 'made work,' the appropriations to sustain the same are not grants for direct relief purposes, but are made for the purpose of furnishing employment to needy and qualified persons *with the intention that remuneration is to be given to those who render an actual service* in their employment."

Accord, National Labor Relations Board v. Leviton Mfg. Co., Inc. (C. C. A. 2), 111 Fed. (2d) 619; *Stewart Die Casting Corporation v. National Labor Relations Board* (C. C. A. 7), — Fed. (2d) —, 6 L. R. R. 691. There is no more reason for requiring appellant to reimburse these work relief projects than there is for exacting the same requirement as to private employers for whom the strikers may have worked. Since the governments supplying funds for the work relief projects received value for work performed upon the projects, the decree of the lower court, in effect, requiring the appellant to pay for

this work, confers a gratuitous benefit upon these governments. The Board's order, enforced by the lower court, then, is clearly *more than remedial* as to these governments. But, even if it were merely remedial as to them, it still could not in any way effectuate the policies of the Act, as is seen *supra,* pages 13-14.

On the contrary, the order is penal as to the appellant, because the order *pro tanto* transfers a portion of the cost of the public improvements made by the work relief projects from the public, which presumably is to profit by it, to the appellant, which will do so only as a member of the public. As stated in *National Labor Relations Board v. Leviton Mfg. Co., Inc.,* fully quoted *infra,* "there could be no clearer instance of a punitive measure than that."

The foregoing arguments are supported by well-considered decisions of four Circuit Courts of Appeals. There are no decisions to the contrary except those of the court below, the opinions of which on this point can hardly be considered illuminating. In *National Labor Relations Board v. Leviton Mfg. Co., Inc.* (C. C. A. 2, April 29, 1940), 111 Fed. (2d) 619, the court held invalid a substantially identical order.[8] L. Hand, *J.,* announcing the opinion of the court, said, page 621:

> "The Third Circuit has twice passed upon the second point in the Board's favor, though without more discussion than to say that they thought it within the power of 'affirmative action' to 'effectuate the policies' of the act which Sec. 10 (c), 29 U. S. C. A. Sec. 160 (c), confers. *Republic Steel Corp. v. National Labor Relations Board,* 3 Cir. 107 F. 2d 472, 478; *Union Drawn Steel Co. v. Nat. Labor Rel. Board,* 3 Cir., 109 F. 2d, 587, 594. We cannot see that the

[8] The order "directed the company, after deducting from Levine's back pay any money received 'for work performed upon Federal, State, county, municipal, or other work-relief projects,' to 'pay over the amount, so deducted, to the appropriate fiscal agency of the * * * governments which supplied the fund for said work-relief projects.'" (p. 620.)

point was ruled in *National Labor Rel. Board v. Planters Manufacturing Co.*, 4 Cir., 105 F. 2d 750, 753. The 'affirmative action' which the section contemplates must be remedial, and not punitive or disciplinary (*Consolidated Edison Co. v. Nat. Labor Rel. Board*, 305 U. S. 197, 236, 59 S. Ct. 206, 83 L. Ed. 126; *National Labor Rel. Board v. Fansteel Metallurgical Corp.*, 306 U. S. 240, 257, 59 S. Ct. 490, 83 L. Ed. 627, 123 A. L. R. 599; *Nat. Labor Rel. Board v. Newport News Shipbuilding Co.*, 308 U. S. 241, 250, 60 S. Ct. 203, 84 L. Ed. ....), and the order, qua payments, must therefore be confined to restitution for the wrong done, however widely that should be conceived. The Board itself has always deducted from the wages to be recovered what the employee may have earned meanwhile, and it is impossible to see how it could have done less, whatever may be proper as to what he could have earned by reasonable efforts, but did not. His receipts may be of three kinds: Wages from a private employer; wages from a public agency; alms or a dole. As to the first, the Board has never suggested that the employer must pay to another private employer what that employer paid to the employee, and obviously, that would be absurd. Since the order speaks of 'monies received * * * for work performed,' we need not consider alms, or a dole. 'Monies received * * * for work performed' may be no more than a fair return for services rendered, or they might have been deliberately made higher, the margin being dole; and the record at bar does not contain any evidence on the point. At most, any such provision would have to be confined to such a margin; we do not suggest that even then it would be valid. However, the whole administration of 'work-relief' was conceived in a spirit exactly the opposite of charity; the very purpose of it was that the employees should understand themselves not to be the objects of charity, but to be performing work of a value equal to what they received. As the case stands, therefore, there is no more reason why the company should be compelled under the guise of restitution, to subvene the public enterprises on which Levine worked, than if these had been the ventures of a private capitalist.

We must assume that he gave as much as he got, and the order *pro tanto* transferred the burden of the public improvement from the public, which presumably is to profit by it, to the company which will do so only as a member of the public. *There could be no clearer instance of a punitive measure than that.* There should therefore be deleted from Article II (e) of the order all that part beginning with the words, 'deducting, however, from the amount' etc."

In *Phelps Dodge Corporation v. National Labor Relations Board* (C. C. A. 2, July 11, 1940) 113 Fed. (2d) 202, 6 L. R. R. 732 the same court omitted the same provision on the ground that "this part of the order went *beyond the power* of the Board," citing its prior decision in *National Labor Relations Board v. Leviton Mfg. Co., supra.* In *National Labor Relations Board v. Tovrea Packing Co.* (C. C. A. 9, April 30, 1940), 111 Fed. (2d) 626, the court held this standard provision invalid saying, page 630:

"The Act, Sec. 10 (c), 29 U. S. C. A. Sec. 160 (c), provides for 'reinstatement of employees with or without back pay, as will effectuate the policies of this Act (chapter).' For a proper understanding this statement must be read and considered as a whole. To our minds the discretion conferred upon the Board is limited to the point of whether an order for back pay will do more toward effectuating the purposes of the Act than to omit it—or possibly than an order for payment of part thereof. Whether or not this provision is held to be punitive in nature, we see no warrant for doing other than it provides. Certainly it does not authorize the Board to go outside of the statute and prescribe its own coercive measures in aid of 'effectuating' the purposes of the Act. *Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126; *National Labor Relations Board v. Remington Rand,* 2 Cir., 94 F. 2d 862, 872."

In *Stewart Die Casting Corporation v. National Labor Relations Board* (C. C. A. 7, July 3, 1940), — Fed. (2d) —, 6 L. R. R. 691, *supra,* the court refused to enforce this

standard provision, citing *National Labor Relations Board v. Leviton Mfg. Co.* and *National Labor Relations Board v. Tovrea Packing Company, supra,* and stated, page 696:

> "We are impressed with the reasoning employed and the conclusion reached in these cases that the Board *is without power* to decree such a requirement."

The court advanced other reasons which will be discussed hereinafter under Point B. In *New York Handkerchief Company v. National Labor Relations Board* (C. C. A. 7, July 11, 1940), — Fed. (2d) —, 6 L. R. R. 729, the same court held likewise. In *National Labor Relations Board v. Waumbec Mills, Inc.* (C. C. A. 1, Aug. 20, 1940), — Fed. (2d) —, 6 L. R. R. 877, the court, speaking through Magruder, *J.*, said that in this respect "* * * we believe the Board's order is without statutory warrant," (p. 882) following *National Labor Relations Board v. Leviton Mfg. Co., supra.*

POINT B.

Section 2, paragraphs (b), (c) and (g) of the decree of the lower court, enforcing the corresponding sections of the Board's order, are erroneous because the corresponding portions of the Board's order in this respect are arbitrary, unreasonable, and constitute an abuse of its discretion in that (1) it does not appear that the fiscal agencies of the government or governments providing the funds for work relief projects which have paid moneys to employees covered by the decree for work performed on such projects have requested reimbursement for such payments from the appellant as parties to this proceeding, or otherwise, or (2) that such agencies have the power to receive the amounts ordered paid to them by the appellant, and (3) the appellant cannot properly be required to ascertain in what proportion, if any, the fiscal agencies of the government or governments, to which payments are ordered to be made, have supplied funds for the work relief projects which have paid

moneys to the employees covered by the decree, and to reimburse such agencies in such proportions.

The foregoing propositions are all supported by *Stewart Die Casting Corporation v. National Labor Relations Board* (C. C. A. 7, July 3, 1940), — Fed. (2d) —, 6 L. R. R. 691, in which the court, in refusing to enforce a substantially identical provision in an order of the Board, said page 696:

> "Although the suggestion is not made, we should think a serious question would be presented as to the right of a governmental agency to accept such funds in the absence of legislative authority so to do. Nor do we think the Board, as argued, is vested with discretionary authority in this respect, *but even so, under the circumstances presented, the order would constitute an abuse of such discretion.* No governmental agency, either before the Board or here, has requested that it be reimbursed for such payments. The order places upon petitioner an unreasonable requirement. How could it know or ascertain which, if any, of the numerous governmental agencies had furnished the employees with work-relief and the amount thereof: Although there is nothing indicative in the record, it is a matter of common knowledge that in some work-relief projects the funds are supplied by more than one, and sometimes numerous agencies. Under such circumstances, would it be the duty of petitioner to ascertain in what proportion the funds were furnished by these numerous agencies and reimburse them in the same proportion? Other questions of a similar nature suggest themselves, which we think demonstrate that the provision is unreasonable and arbitrary as well. The Board's request for enforcement in this respect is denied."

First, the governments sponsoring the work relief projects upon which the employees covered by the decree worked were not parties to this proceeding before the Board or the lower court. They made no attempt to intervene, and have never requested reimbursement as ordered

by the Board. As a general rule, relief will not be awarded to one who does not seek it personally or by way of privity or representation. 21 *C. J.* 676:

> "* * * Nor will relief be awarded to one who does not seek it personally or by way of privity or representation, * * *."

While this Court has held that it was not improper for the Board to order an employer to withdraw recognition from a union found to have been dominated by the employer which was not a party to the proceeding before the Board, this situation seems entirely different from one in which the Board has conferred monetary benefits upon governmental bodies not parties to the proceeding, since withdrawal of recognition did not involve any action on the part of the union, whereas in the case at bar the right of the governments to participate and the extent thereof, was involved. In any event, the conferring of a gratuitous benefit upon these governments without any request or action on their part would seem to be of such an unusual and unprecedented nature as to constitute an arbitrary abuse of discretion by the Board.

Second, as a general proposition, governmental agencies have only those powers which are expressly conferred upon them, or are incidentally necessary to the exercise of such powers. *Huffman v. State Roads Commission* (Md. 1927), 137 Atl. 358:

> "The growth and development of boards and commissions as agencies for the administration of varied governmental functions has with the constantly increasing extent and complexity of governmental activities been extremely rapid in recent years, but the law as to their precise status and powers cannot be said to be either settled or certain. It is generally recognized, however, that while such agencies are governmental, they have no powers, but such as are expressly delegated to them by the organic or statutory law of the government of which they are a part, or such as are by

implication essential to the full and adequate exercise of such express powers."

People ex rel. Brundage v. Righeimer (Ill. 1921), 132 N. E. 229; *State ex rel. Licking Township v. Clamme* (Ind App. 1922), 134 N. E. 676; *Danciger Oil & Refining Co. v. Railroad Commission* (Tex. 1932), 49 S. W. (2d) 837; *Railroad Commission et al. v. Highway Insurance Underwriters* (Tex. 1939), 124 S. W. 2d 413; *Newfield v. Ryan* (C. C. A. 5, 1937), 91 Fed. (2d) 700. The order requires payment of the amounts involved "to the appropriate fiscal agency of the Federal, State, county, municipal or other government or governments which supplied the funds for said work relief projects." Certainly, it must be assumed that these "fiscal agencies" do not have the express power to accept gratuitous payments from private individuals. As an illustration, the greater part of the amounts which must be paid out under this portion of the decree of the lower court would go to the Federal Emergency Administration of Public Works. The statute creating this agency, 40 U. S. C. A. Sections 401 to 414, inclusive, nowhere expressly grants any authority to the Administration to receive funds from private sources. Nor is the receipt of funds from private sources a power incidental to the express powers conferred upon the Administration or its fiscal agency. To carry out this portion of the decree, it would be necessary for appellant to determine what are the proper "fiscal agencies" to whom such payments must be made, and to make such payments even though the fiscal agencies should have no power to accept such payments, and should take the position that they could not accept such payments. Certainly, the Board's order is arbitrary and unreasonable for this reason.

The arbitrary character of the Board's order in this respect is clearly demonstrated by the fact that its first final order (R. I, 305), which it later set aside (R. I, 317), and which was issued after the Board had given full con-

sideration to all questions of law and fact involved, did not contain this provision. It must be assumed that in this, its original order, the Board ordered all affirmative action which, upon a full consideration of the case, it found necessary to effectuate the policies of the Act. If such an order was not necessary to effectuate the policies of the Act at the time of the Board's original order, why did it become necessary when the Board issued its second final order which is enforced by the decree of the lower court?

POINT C.

If the Court should be of the opinion that we are wrong in our position advanced under Point A, *supra,* namely, that the Board has no jurisdiction, *as a matter of law,* to order payment by the appellant to governments supplying the funds for work relief projects upon which its employees worked, nevertheless, the record in the case at bar fails to disclose *any factual basis* upon which the Board could base a conclusion that such an order would effectuate the policies of the Act. On the contrary, the record affirmatively discloses that the Board's order is based upon a conclusion which is not supported by any evidence. Therefore, the Board's order was not supported by evidence and the lower court erred in enforcing it in this respect.

First, as pointed out under Point A, it is established by the decisions of this Court in *Consolidated Edison Company v. National Labor Relations Board, supra,* and *National Labor Relations Board v. Fansteel Metallurgical Corporation, supra,* that the Board is limited, in ordering affirmative action under Section 10(c) of the Act, to an order of a remedial nature. The Board could make an order remedial as to the work relief projects only if the order attempted to place such projects in the position in which they would have been if the appellant had not committed acts found by the Board to have been unfair labor practices. In short, such an order could be remedial only

if it reimbursed such work relief projects for losses sustained as a result of the appellant's acts.

There is no evidence in the record relating to work relief projects. Therefore, there is no evidence showing that the work relief projects on which employees of the appellant covered by the decree of the lower court worked sustained any losses as a result of such work. On the contrary, as demonstrated under Point A, theoretically such projects received value equivalent to the amounts paid to these employees. In the absence of evidence in the record as to work relief projects, there is no evidence from which the Board could infer or find that requiring appellant to reimburse such work relief projects would effectuate the policies of the Act. However, this Court has repeatedly held that the Board's order must in all respects be supported by substantial evidence. *Consolidated Edison Company v. National Labor Relations Board,* 305 U. S. 197; *National Labor Relations Board v. Columbian Enameling & Stamping Co. Inc.,* 306 U. S. 292; *National Labor Relations Board v. Sands Mfg. Co.,* 306 U. S. 332. This Court has recognized that there must be support in the evidence for the conclusion and finding by the Board that the affirmative action ordered by the Board will effectuate the policies of the Act. In *National Labor Relations Board v. Pacific Greyhound Lines, Inc.,* 303 U. S. 272, the Board affirmatively ordered the employer to withdraw all recognition from an independent union. This Court stated (page 273) that the question involved was whether the facts found by the Board afforded a basis for its conclusion that the policies of the Act would be effectuated by its order, and at page 275:

> "Whether the continued recognition of the Drivers' Association by respondent would be a continuing obstacle to the exercise of the employees' right of self-organization and to bargain collectively through representatives of their own choosing, was an inference of fact which the Board could draw if there was evidence

to support it. Section 10(e); see *Swayne & Hoyt v. United States,* 300 U. S. 297. We cannot say that the Board's conclusion was without support in the evidence and in the subsidiary findings which respondent does not challenge."

In the case at bar, the Board's conclusion *is* without support in the evidence.

Second, the record affirmatively discloses that the order of the Board in the case at bar was not based upon a finding that the portion of its order requiring payments to work relief projects would effectuate the policies of the Act. It is true that the Board in Section 2 of its order (R. II, 1105) required the appellant to "take the following affirmative action *which the Board finds* will effectuate the policies of the Act; * * *," and thus found *generally* that *all* of the affirmative action ordered would effectuate the policies of the Act. However, this *formal* finding in the order must be considered in connection with the *subsidiary* finding in the Board's decision. Aside from the provisions in the order, the Board did not deal with the matter of payments to work relief projects except in that portion of its decision entitled "The Remedy," in which it stated (R. II, 1096):

> "The question is raised by the Union's exceptions whether the respondent should be permitted to deduct from the back pay due under our Order money received by an employee for work performed upon Federal, State, county, municipal or other work relief projects during the period for which the respondent is under obligation to pay such employee back wages. In so far as the employee receives remuneration for such work during periods when he would otherwise have been working for the respondent, it would not seem necessary, in restoring him to the status quo, that he be reimbursed in such amounts. *Nevertheless, to hold that the losses accruing from the respondent's unfair labor practices must be borne by the government or governments financing the work relief project would not effectuate the purposes of the Act. We shall therefore*

order the respondent to deduct such sums from the amounts otherwise due the employees and to pay such deductions over to the appropriate fiscal agency of the Federal, State, county, municipal or other government or governments which supplied the funds for the work relief project."

The emphasized language shows that the basis of this portion of the Board's order was that to hold that the governments financing work relief projects must bear losses accruing from the unfair labor practices found by the Board to have been committed by the appellant "*would not* effectuate the purposes of the Act." Thus, it appears that the Board did not find, either as a matter of fact, or as a conclusion of law, that this portion of its order, requiring affirmative action, *would* effectuate the policies of the Act. Obviously, the negative finding of the Board cannot supplant, and perform the function of, a positive finding that the affirmative action required would, in f ct or law, effectuate the policies of the Act. Since this was the only subsidiary finding upon which the Board based its *formal* and *general* finding in its order, it is clear that the Board did not, in fact, find that this portion of its order would effectuate the policies of the Act. Therefore, there was not only no evidence upon which the Board could base such a finding, but, further, no finding by the Board in this respect, and the court below erred in enforcing by its decree this portion of the Board's order.

Third, it is clear from the Board's subsidiary finding, *supra,* that the Board proceeded upon the faulty premise that the governments which financed the work relief projects, upon which the appellant's employees worked, *sustained losses* as a result of unfair labor practices found to have been committed by the appellant. As pointed out, *supra,* there is no evidence in the record that such losses were sustained, and in theory no such losses could be sustained. Therefore, the finding by the Board, necessarily subsidiary to a conclusion that an order requiring reim-

bursement for such losses would effectuate the policies of the Act, was not supported by evidence, and was erroneous as a matter of law.

CONCLUSION.

In view of the foregoing, it is submitted that the decree of the lower court should be modified by excluding therefrom the provisions which direct payments to the proper fiscal agencies of the governments furnishing the funds for work relief projects for which employees covered thereby performed work.

Respectfully submitted,

LUTHER DAY,
THOMAS F. PATTON,
JOSEPH W. HENDERSON,
MORTIMER S. GORDON,

Attorneys for Appellant,
Republic Steel Corporation.

APPENDIX A.

PERTINENT PORTIONS OF THE LOWER COURT'S DECREE (R. VIII, 6294).

"2. Take the following affirmative action which the National Labor Relations Board finds will effectuate the policies of the National Labor Relations Act; * * *

"(b) Offer to Peter Mouyios, Victor Arias, Mike Ugranovich, Will S. Wright, Sabri Shaban, and George Troyanovich (group A); John Lazar, Michael Krill, Balare Chismus, William A. Harren, Charles Neverdusky, Anthony Martin de Long, Richard Green, and Hallie P. Hite (group B), in the manner provided in the section in the Board's decision entitled 'The remedy,' immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority and other rights and privileges; and make them whole for any losses of pay they have suffered by reason of the petitioner's discriminatory acts, by payment to each of them, respectively, of a sum of money equal to that which each of them would normally have earned as wages during the period, in the case of group A, from the date of their lay-off or discharge until the date when the strike began, and again from the date on which operations in their departments began after the reopening of the plants involved to the date of the offer of reinstatement as provided herein, and in the case of group B, from the date of the refusal to reinstate until the date of the offer of reinstatement as provided herein; less the amounts, if any, which each earned during said period, deducting, however, from the amount otherwise due to each of the said employees, monies received by said employees during said periods for work performed upon Federal, State, county, municipal or other work relief projects; and pay over the amounts, so deducted, to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work relief projects;

"(c) Make whole Thomas Cikah, John Popik, Frank Pirichy, Michael Naletrich, Wilbert Neuman (group C); Thomas White, Charles Bernard Fagan, John Exall, John Petak, Mathew Babich, Gaetano Armeli, and Fred Korecky (group D) for any losses of pay they have suffered by reason of the petitioner's discriminatory acts, by payment to

each of them, respectively, of a sum of money equal to that which each of them would normally have earned as wages during the period, in the case of group C, from the date of their discharge to the date of their offer of reinstatement prior to the strike, and in the case of group D, from the date of their lay-off or discharge until the date of the strike; less the amounts, if any, which each earned during said period, deducting, however, from the amount otherwise due to each of the said employees, monies received by said employees during said periods for work performed upon Federal, State, county, municipal or other work relief projects; and pay over the amounts, so deducted, to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work relief projects; * * *

"(f) Offer to those employees at its plants in the Canton, Massillon, Youngstown, Warren, Niles, and Cleveland district (including those referred to as groups C and D in paragraph 2 (c) above), who went on strike on May 25, 1937, and thereafter, and who since the order of the National Labor Relations Board dated October 18, 1938, made, or who hereafter shall make, application (except Charles Byers, Sidney Watkins, A. C. Scott, John Borawiec, George A. Bundas, Andrew J. Marsh, Mike Spelich, Herman Herzog, Jesse Rentario (Runtario), Pete Vasleo, Omer Williams, Joe Morton, Leo Cox, Mike Walker, Sam Caputo, Will Williams, Theodore Pietowski, alias Tub, alias Friday, Kenneth H. Steed, alias Harry K. Steed, E. J. Parpontsi, Otis Cesar, Erardo Garcia, Nick Woodrich, Lewis Simonelli, John Bell, Sam Parnelli, alias Priorrello, Harold Rink, Paul Woodward, Ivan Bartalic, Steve Miku, John Zgurich, and Chester Dewitt), immediate and full reinstatement to their former or substantially equivalent positions without prejudice to their seniority or other rights or privileges, in the manner provided in the section in the Board's decision entitled 'The remedy'; and place those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said section, and thereafter, in said manner, offer them employment as it becomes available;

"(g) Make whole all the employees referred to in paragraph 2 (f) above for any losses they may have suffered or may suffer by reason of any refusal of reinstatement or placement upon the preferential list, required by paragraph 2 (f) of the order of the National Labor Relations Board dated October 18, 1938, and for any losses they may suffer by reason of any refusal of reinstatement or placement upon the preferential list, required by paragraph 2 (f) above, by payment to each of them of a sum of money equal to that which each of them would normally have earned as wages during the period from five (5) days after the date of any application for reinstatement made subsequent to the order of the National Labor Relations Board dated October 18, 1938, to the date of offer of reinstatement or placement upon the preferential list, less the amount, if any, which each, respectively, earned during said period, deducting, however, from the amounts otherwise due to each of the said employees, monies received by said employees during said period for work performed upon Federal, State, county, municipal or other work relief projects; and pay over the amounts, so deducted, to the appropriate fiscal agency of the Federal, State, county, or municipal or other government or governments which supplied the funds for said work relief projects;"

APPENDIX B.

PERTINENT PORTIONS OF OPINIONS OF CIRCUIT COURTS OF APPEALS REPORTED IN THE LABOR RELATIONS REPORTER, AND NOT OFFICIALLY REPORTED AT DATE OF BRIEF.

Stewart Die Casting Corporation v. National Labor Relations Board (C. C. A. 7, No. 7132, July 3, 1940), 6 L. R. R. 691, 695:

> "In connection with the Board's order that the various groups of employees be reinstated with back pay, there is the provision that the amounts received by such employees for work performed upon Federal, State, county, municipal or other work-relief projects, be deducted, and 'paying over the amounts so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects.' It is the quoted provision of the order which petitioner contends the Board is without authority to require. The courts are divided as to the propriety of an order of this character. It was approved in *Republic Steel Corp. v. Labor Board,* 107 F. (2d) 472, 478 (5 L. R. R. 266). The court, without discussion, however, merely expresses the opinion that such an order is within the discretionary power of the Board, and calls attention to *Labor Board v. Planters Mfg. Co.,* 105 F. (2d) 750 (4 L. R. R. Man. 616), where a similar order was approved, also without discussion.
>
> "In *Labor Board v. Somerset Shoe Co.* (6 L. R. R. 424) (First Cir., not reported), decided May 9, 1940, the provision was approved without discussion and, apparently, without consideration. In *Union Drawn Steel Co. v. Labor Board,* 109 F. (2d) 587, 594 (5 L. R. R. 634), we again find the provision approved by the same court which approved the order in *Republic Steel Corp. v. Labor Board, supra.*
>
> "On the other hand, we have a contrary holding in *Labor Board v. Leviton Mfg. Co.* (6 L. R. R. 351) (Second Cir., not reported), decided April 29, 1940, and *Labor Board v. Tovrea Packing Co.* (6 L. R. R. 387) (Ninth Cir., not reported), decided April 30, 1940. We

are impressed with the reasoning employed and conclusion reached in these cases that the Board is without power to decree such a requirement.

"The Board inquires in its brief, in connection with this matter:

> '* * * Should the burden of relieving the distress of such employees be placed upon the public generally or upon the employer whose unlawful practices are responsible for their being out of work?'

This inquiry, in our opinion, is beside the question. Undoubtedly, the Board has the authority to order compensation for the employee who has sustained a loss by reason of an unfair labor practice on the part of the employer. We find nothing in the Act, however, which indicates an intention by Congress to confer upon the Board the power of guardianship over the treasurer of a governmental agency. As was pointed out in the *Leviton* case, *supra*, the theory of 'work-relief' is not charity but compensation for work performed. The court said:

> '* * * We must assume that he gave as much as he got, and the order *pro tanto* transferred the burden of the public improvement from the public, which presumably is to profit by it, to the company which will do so only as a member of the public. * * *'

"Although the suggestion is not made, we should think a serious question would be presented as to the right of a governmental agency to accept such funds in the absence of legislative authority so to do. Nor do we think the Board, as argued, is vested with discretionary authority in this respect, but even so, under the circumstances presented, the order would constitute an abuse of such discretion. No governmental agency, either before the Board or here, has requested that it be reimbursed for such payments. The order places upon petitioner an unreasonable requirement. How could it know or ascertain which, if any, of the numerous governmental agencies had furnished the employees with work-relief and the amount thereof? Although there is nothing indicative in the record, it is a matter of common knowledge that in some work-relief

projects the funds are supplied by more than one, and sometimes numerous agencies. Under such circumstances, would it be the duty of petitioner to ascertain in what proportion the funds were furnished by these numerous agencies and reimburse them in the same proportion? Other questions of a similar nature suggest themselves, which we think demonstrate that the provision is unreasonable and arbitrary as well. The Board's request for enforcement in this respect is denied."

New York Handkerchief Manufacturing Company v. National Labor Relations Board (C. C. A. 7, No. 7147, July 11, 1940), 6 L. R. R. 729, 730:

"The Board found that petitioner had committed the unfair practices as charged, but had not discriminated against all of the employees named in the complaint (Note No. 1). Petitioner was ordered to cease and desist from its unfair labor practices; was directed to bargain collectively upon request with the Union; to offer reinstatement with back pay to seven named employees (Note No. 2); * * *"

"Note No. 2.—The order provided for a deduction from the amount otherwise due each of said employees monies received for work performed upon Federal, State, county, municipal or other work-relief projects and, that petitioner pay amounts so deducted to the appropriate fiscal agency of the governments which supplied the funds for said work-relief projects."

Page 732:

"As stated heretofore (footnote 2) the Board's order directs petitioner to reimburse any governmental agency for moneys paid to employees found to have been unlawfully discharged. We have, in the case of *Stewart Die Casting Corporation v. Labor Board* (6 L. R. R. 691), decided July 3, 1940, concluded that the Board is without authority to impose such a requirement. It would serve no good purpose to repeat what we said in that case, or further discuss the question.

"The petition to review and set aside the order of the National Labor Relations Board is denied and the petition of the Board for an order of enforcement is allowed, the order to be modified in conformity with the suggestion last above mentioned."

M. H. Ritzwoller Company v. National Labor Relations Board (C. C. A. 7, No. 7080, July 16, 1940), 6 L. R. R. 758:

"Major, Circuit Judge.—On petition for rehearing in the above entitled matter, petitioner raises the question as to the validity of that portion of the Board's order (5 L. R. R. 54, 15 N. L. R. B. 15) which requires petitioner to pay over 'to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects.'

"Nothing was said concerning this requirement either in petitioner's original brief or in the Board's brief. It is mentioned, but not argued in petitioner's reply brief. The requirement is shown in a footnote of the Board's order as found in the Transcript of Record. The question, therefore, was not considered or decided.

"We have recently in *Stewart Die Casting Corporation v. National Labor Relations Board* (6 L. R. R. 691), decided July 3, 1940, held that the Board is without authority to make such requirement. There is no occasion to repeat or further discuss what we said in that case.

"In addition to the modification suggested in our original opinion (6 L. R. R. 429), the Board's order is further modified in conformity with this additional holding, and as so modified its request for enforcement is allowed."

National Labor Relations Board v. Waumbec Mills, Inc. (C. C. A. 1, No. 3528, August 20, 1940), 6 L. R. R. 877, 882:

"In one particular we believe the Board's order is without statutory warrant. In paragraph 2(b) of the order the employer is directed to reimburse Chartier and Geoffrion for any loss of pay resulting from the unfair labor practice less his net earnings elsewhere,

'deducting, however, from the amount otherwise due to each of them monies received by him during that period for work performed upon Federal, State, county, or municipal or other work-relief projects, and pay over the amount so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said work-relief projects.' For the reasons stated in *National Labor Relations Board v. Leviton Mfg. Co.*, 111 F. (2d) 619 (6 L. R. R. 351), this quoted portion of paragraph 2(b) of the order cannot be enforced, and will be omitted from our decree. Accord, *National Labor Relations Board v. Tovrea Packing Co.*, 111 F. (2d) 626 (6 L. R. R. 387); *Stewart Die Casting Corp. v. National Labor Relations Board* (6 L. R. R. 691), (C. C. A. 7th) decided July 3, 1940. We did not discuss this point in our recent decision in *National Labor Relations Board v. Somerset Shoe Co.*, 111 F. (2d) 681 (6 L. R. R. 424), because the back pay portion of the order as a whole was not enforced by us, for the reasons stated in the opinion.

"A decree will be entered enforcing the order of the Board with the modification of paragraph 2(b) as previously indicated."

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